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PAUL REICHE III and ROBERT FREDERICK FORD

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

STARDOCK SYSTEMS, INC.,

Plaintiff,

v.

PAUL REICHE III and ROBERT
FREDERICK FORD,

Defendants.

Case No. 4:17-CV-07025-SBA

**REICHE AND FORD'S EVIDENTIARY
OBJECTIONS TO THE DECLARATION
OF BRAD WARDELL IN SUPPORT OF
STARDOCK'S *EX PARTE* MOTION FOR
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE WHY
PRELIMINARY INJUNCTION SHOULD
NOT BE GRANTED**

Judge: Hon. Sandra B. Armstrong

Complaint Filed: Dec. 8, 2017
Trial Date: June 24, 2019

PAUL REICHE III and ROBERT
FREDERICK FORD,

Counter-Claimants,

v.

STARDOCK SYSTEMS, INC.,

Counter-Defendant.

Defendants and Counter-Claimants Paul Reiche III (“Reiche”) and Robert Frederick Ford (“Ford”) (collectively, “Reiche and Ford”) hereby submit the following objections to the Declaration of Brad Wardell (“Wardell Declaration”) in Support of Stardock’s *Ex Parte* Motion for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Be Granted (“Stardock’s PI Motion”). The Wardell Declaration is objectionable for several reasons and should be disregarded or accorded little or no weight in the determination of Stardock’s PI Motion.

I. PORTIONS OF THE WARDELL DECLARATION SHOULD BE DISREGARDED

The Wardell Declaration should be disregarded for purposes of Stardock’s PI Motion, because it is inadmissible under the Federal Rules of Evidence (“FRE”). The Federal Rules of Evidence apply to evidence submitted to the Court on motion practice. FRE 101 (Rules of Evidence apply to all proceedings in the courts of the United States); FRE 1101 (listing exceptions to Rule 101). While courts have some discretion to consider inadmissible evidence when a preliminary injunction is urgently needed to prevent irreparable harm before a full resolution on the merits is possible, courts routinely decline to consider, or afford any weight o, such inadmissible evidence in appropriate circumstances. *See* Beijing Tong Ren Tang (USA) Corp. v. TRT USA Corp., 676 F.Supp.2d 857, 861 (N.D. Cal. 2009); *U.S. v. Guess*, 2004 WL 3314940, at *4 (S.D. Cal. Dec. 15, 2004) (“conditional inferences, innuendo, and even strong suspicions do not satisfy [the movant’s] burden”); *Kitsap Physicians Service v. Washington Dental Service*, 671 F.Supp. 1267, 1269 (W.D. Wa. 1987) (refusing to consider affidavits “that would have been inadmissible under the Federal Rules of Evidence” and denying preliminary injunction).

II. RELEVANT FEDERAL RULES OF EVIDENCE

In Reiche and Ford’s evidentiary objections that follow, Reiche and Ford rely on the following evidentiary rules:

FRE 602: “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”

FRE 701: “If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness’s perception; (b) helpful to clearly

1 understanding the witness's testimony or to determining a fact in issue; (c) not based on scientific,
2 technical, or other specialized knowledge within the scope of Rule 702."

3 **FRE 801, 802:** "'Hearsay" means a statement that: (1) the declarant does not make while
4 testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the
5 matter asserted in the statement." Hearsay is not admissible.

6 **FRE 1002:** "An original writing, recording, or photograph is required in order to prove its
7 content unless [the] rules or a federal statute provide otherwise."

8 **Speculation:** Numerous courts have held that speculative evidence is inadmissible.
9 *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 474 (9th Cir. 1997); *Nevada Power Co. v. Monsano*
10 *Co.*, 891 F.Supp. 1406, 1415 (D. Nev. 1995) ("speculative testimony about how another might
11 have acted without personal knowledge is not admissible as evidence."); *Rhoades v. Alameida*,
12 2008 WL 3154735, at *2 (E.D. Cal. Aug. 4, 2008); *Alfano v. BRP Inc.*, 2010 WL 2292265, at *2
13 (E.D. Cal. June 4, 2010).

14 15 **III. SPECIFIC EVIDENTIARY OBJECTIONS**

	<u>Proffered Evidence</u>	<u>Objection</u>
1. 18 19 20 21 22 23 24 25	Wardell Decl., ¶ 3, Pg. 2, Lines 8-10 "Stardock purchased all rights to the Star Control intellectual property."	<u>FRE 602</u> <u>FRE 1002</u> <u>Lack of Foundation</u> Wardell has failed to provide the foundation establishing the purported purchase of "all rights to the Stardock intellectual property." Moreover, the documents memorializing the purported purchase are required to prove that such a purchase took place and are the "best evidence" of such a purchase.
26 27 28	Wardell Decl., ¶ 7, Pg. 3, Lines 1-2 "Stardock has not incorporated any copyrightable artwork from Star Control I,	<u>FRE 602</u> <u>FRE 701</u>

1		Star Control II, or Star Control III into the <i>Origins</i> game itself.”	Wardell lacks the personal knowledge necessary to make this statement, as he does not have the expertise necessary to provide testimony as to what constitutes “copyrightable artwork.” His opinion therefore constitutes improper lay witness testimony that encompasses technical and/or specialized exclusively within the scope of Rule 702.
2	4.	Wardell Decl., ¶ 15, Pg. 3, Lines 24-26 “We expect similar numbers for Origins. A DMCA takedown notice on Steam would reduce sales and revenue by approximately 88% turning what would have been a successful game into a failure.”	<u>FRE 602</u> <u>Lack of Foundation</u> <u>Speculation</u> Wardell has failed to provide the foundation necessary to support his statement that Stardock expects similar numbers for Origins or that a DMCA notice would reduce sales and revenue by approximately 88%. Wardell lacks personal knowledge and is speculating as to whether (1) Origins would be a successful game, and (2) a DMCA notice would turn Origins into a failure.
3		Wardell Decl., ¶ 16, Pg. 4, Lines 5-6 “and its reputation will be harmed in the marketplace.”	<u>FRE 602</u> <u>Lack of Foundation</u> <u>Speculation</u> Wardell lacks personal knowledge and is speculating as to whether Stardock’s reputation will be harmed.
4		Wardell Decl., ¶ 24, Pg. 5, Lines 1-2 “Any DMCA takedown notice will also irreparably impact Stardock’s ability to partner with a game console publisher.”	<u>FRE 602</u> <u>Lack of Foundation</u> <u>Speculation</u> Wardell lacks personal knowledge and is speculating as to whether a DMCA notice will impact its ability to partner with a console publisher.
5		Wardell Decl., ¶ 24, Pg. 5, Lines 3 “A DMCA takedown of the game will prevent any console publisher from publishing the game. Without a game	<u>FRE 602</u> <u>Lack of Foundation</u> <u>Speculation</u>

1		console publisher, <i>Origins</i> will only be available on PC which will reduce its potential audience and revenue by approximately 50 percent.”	Wardell lacks personal knowledge and is speculating as to whether a DMCA notice will prevent a console publisher from publishing <i>Origins</i> .
2			Wardell has failed to provide foundation or otherwise establish personal knowledge that Stardock’s potential audience and revenue will be reduced by approximately 50 percent. This statement is speculative.
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8		Wardell Decl., ¶ 25, Pg. 5, Lines 9-10	<u>FRE 602</u>
9		“DMCA take down notices permanently harm our relationship with our customers.”	<u>Lack of Foundation</u>
10			<u>Speculation</u>
11			Wardell lacks personal knowledge and is speculating as to whether a DMCA notice will permanently harm Stardock’s relationship with its customers.
12			
13		Wardell Decl., ¶ 26, in its entirety	<u>FRE 801, 802</u>
14		“The rumored suggestion that <i>Origins</i> will not be released has <i>already</i> led to backlash from Stardock’s customers who have pre-ordered the game and then requested a refund.	<u>Lacks Foundation</u>
15		Following are quotes from customers who requested a refund “because the game might not be released”: [<i>customer quotes removed for brevity but subject to the objection</i>].”	The purported statements from Stardock’s customers are extrajudicial statements now offered for their truth and are therefore inadmissible hearsay.
16			Moreover, Wardell has failed to provide information sufficient to establish the foundation for these statements, or even indicate where the statements originated. For this reason, the statements are inherently unreliable.
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21		Wardell Decl., ¶ 28, Pg. 6, Lines 12-15	<u>FRE 602</u>
22		“False accusations that create doubt amongst Stardock’s ecosystem of partnerships and players in the industry will have material financial and reputation impacts that will have direct financial consequences due to failure to deliver on existing contracts.”	<u>Lack of Foundation</u>
23			<u>Speculation</u>
24			Wardell has failed to establish foundation for his insinuation that statements made by Reiche and Ford are false.
25			Wardell lacks personal knowledge and is speculating as to the financial and reputation impacts that could occur if <i>Origins</i> is not released as scheduled.
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1	Wardell Decl., ¶ 29, Pg. 6, Lines 18-19	<u>FRE 602</u> <u>Lack of Foundation</u> <u>Speculation</u>
2	“The damage from a failed launch would	Wardell lacks personal knowledge and is
3	likely impact the sale of not only <i>Origins</i> ,	speculating as to the “likely impact” and
4	but all of Stardock’s offerings.”	damage that could be associated with a
5		failed launch.
6		Wardell has failed to establish foundation
7		sufficient to support his statement that a
8		failed launch of <i>Origins</i> would impact the
9		sale of “all” of Stardock’s offerings.
10	Wardell Decl., ¶ 30, Pg. 6, Line 24 – Pg. 7, Line 3	<u>FRE 602</u> <u>Lack of Foundation</u> <u>Speculation</u>
11	“Without a legal avenue for purchase, many	Wardell lacks personal knowledge and is
12	customers will acquire the game through	speculating as to the expected actions of its
13	piracy distribution channels. Sales would be	customers in the event <i>Origins</i> is not
14	irreparably lost because if there is no legal	released as scheduled.
15	means to obtain the game many people will	Wardell lacks foundation and is speculating
16	resort to getting it some other way. We	as to whether sales would be “irreparably
17	project sales of approximately \$3.1 million	lost.”
18	in the first 60 days of <i>Origins</i> ’ release with	Wardell has failed to establish foundation
19	approximately \$2 million of that being in the	sufficient to support Stardock’s projected
20	first 14 days. Sales lost due to piracy would	sales of the <i>Origins</i> release.
21	be difficult to calculate, but would be	
22	significant in any case.”	
23	Wardell Decl., ¶ 31, Pg. 7, Lines 4-5	<u>FRE 602</u> <u>Lack of Foundation</u> <u>Speculation</u>
24	“The gaming press would also interpret a	Wardell lacks personal knowledge and is
25	DMCA take down notice as a signal that the	speculating as to how the gaming press
26	merits of the case are with Reiche and Ford.”	would interpret a DMCA notice.
27		
28	Wardell Decl., ¶ 31, Pg. 7, Lines 6-8	<u>FRE 602</u> <u>Lack of Foundation</u> <u>Speculation</u>
	“should a takedown notice preclude sale of	Wardell lacks personal knowledge and is
	<i>Origins</i> on Steam, it would permanently	speculating as to the purported damage that
	damage the value of Stardock’s brand and	would result from the issuance of a DMCA
	reputation and very likely impact the sales of	notice, including with regard to any
	the <i>Origins</i> game.”	

1		purported reputational harm and damage to
2		Stardock's brand.
3	Wardell Decl., ¶ 32, Pg. 7, Lines 9-11	<u>FRE 602</u>
4	“Any delay in the release of <i>Star Control:</i>	<u>Lack of Foundation</u>
5	<i>Origins</i> would require Stardock to severely	<u>Speculation</u>
6	cut back on its gaming staff and require it to	Wardell has failed to establish foundation
7	lay off approximately 26 employees.”	sufficient to support his statement that a
8		delay in the release of <i>Origins</i> would
9		require Stardock to lay off approximately
10		26 employees.

11 DATED: September 17, 2018

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13 By: /s/ Stephen C. Steinberg

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